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In the Supreme Court of the United States

OCTOBER TERM, 1975

JOSEPH J. MAGGIO,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, Joseph J. Maggio, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the United States District Court for the Middle District of Alabama, Northern Division, denying the Petitioner's motion to withdraw his plea of guilty and to vacate the judgment and sentence of two years imprisonment on a charge of mail fraud in violation of 18 U.S.C. 1341.

OPINION BELOW

The opinion of the Court of Appeals is not reported, but is printed in the appendix to this petition (Appendix "A"). The opinion was entered June 9, 1975. A timely Petition for Rehearing And Suggestion for Rehearing En Banc was denied by order dated August 13, 1975 (Appendix "B").

JURISDICTION

The judgment of the Court of Appeals was entered on June 9, 1975 (Appendix "A"). A timely Petition for Rehearing was denied on August 13, 1975 (Appendix "B").

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTES AND RULES

Rule 11, F. R. Cr. P.:

"Rule 11. Pleas.

A defendant may plead not guilty, guilty, or, with the consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and *shall not accept such a plea* or a plea of nolo contendere *without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea.* If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is factual basis for the plea." [Emphasis added]

Proposed Amended Rule 11, F.R.Cr.P.:

Rule 11.

PLEAS

(a) Alternatives. A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(b) Nolo contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) Advice to defendant. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

(1) the nature of the charge to which the plea is offered; and

(2) the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law for the offense to which the plea is offered; and

(3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial.

(d) Insuring that the plea is voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open

court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

(e) Plea agreement procedure.

(1) In general. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will move for dismissal of other charges, or will recommend or not oppose the imposition of a particular sentence, or will do both. The court shall not participate in any such discussions.

(2) Notice of such agreement. If a plea agreement has been reached by the parties which contemplates entry of a plea of guilty or nolo contendere in the expectation that a specific sentence will be imposed or that other charges before the court will be dismissed, the court shall require the disclosure of the agreement in open court at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to acceptance or rejection until there has been an opportunity to consider the presentence report.

(3) Acceptance of plea. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement or another disposition more favorable to the defendant than that provided for in the plea agreement.

(4) Rejection of plea. If the court rejects the plea agreement, the court shall inform the parties of this fact, advise the defendant personally in open court that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) Time of plea agreement procedure. Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) Inadmissibility of plea discussions. Evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

(f) Determining accuracy of plea. Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

(g) Record of proceedings. A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or nolo contendere, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

QUESTIONS PRESENTED

1. Whether a finding of "substantial compliance" with the provisions of Rule 11 of the Federal Rules of Criminal Procedure conforms with the Supreme Court's requirement of "strict" or "scrupulous" compliance as set forth in *McCarthy* v. *United States*, 394 U.S. 459?

2. Whether, where the Circuit Court of Appeals has issued its mandate which in effect requires early implementation of the proposed amended Rule 11 of the Federal Rules of Criminal Procedure "in all district courts in this circuit", a defendant is denied due process of law and equal protection of the laws when his plea of guilty is allowed to stand notwithstanding a clearcut and admitted violation of that mandate?

3. Where a defendant "truly believed" that he would receive a lesser sentence, does he know and understand the consequences of his plea?

STATEMENT OF THE CASE

The petitioner Joseph J. Maggio was indicted in the Middle District of Alabama, Northern Division (Montgomery, Alabama) in indictment Cr. No. 12,793-N on September 14, 1972. (A. 7) The indictment charged Maggio, a corporation, and four other persons with seven counts of mail fraud in violation of 18 U.S.C. 1341 and with one count of conspiracy to commit the alleged mail frauds in violation of 18 U.S.C. 371. (A. 7-15) The case was tried to a jury and the defendants convicted; Maggio subsequently being sentenced to three years imprisonment. (A. 2) Maggio appealed his conviction to the United States Court of Appeals for the Fifth Circuit and the conviction was reversed and remanded. (A. 4)

The cause was again set for trial, but following certain negotiations with the office of the United States Attorney, Maggio tendered a plea of guilty to Count I of the indictment (mail fraud), and the remaining counts of the indictment were dismissed. (A. 17-18) Maggio was then sentenced to two years imprisonment. (A. 19) Shortly thereafter, Maggio filed his motion to withdraw his plea of guilty on the basis that the trial judge did not comply with the requirements of Rule 11 of the Federal Rules of Criminal Procedure in that the Court did not personally address the defendant and determine whether the plea was made voluntarily with understanding of the nature of the charge and the consequences of the plea, and that further the Court did not comply with certain mandatory provisions of the mandate of the Fifth Circuit Court of Appeal's mandate in *Bryan* v. *United States*, 492 F.2d 775, and that further the defendant did not in fact at the time of the plea understand the consequences of his plea. (A. 21-25)

On May 24, 1974, the Court held a hearing on the motion to withdraw the plea of guilty (A. 39-115) and thereafter that same day entered its order denying the motion to withdraw the plea of guilty. (A. 28) This appeal follows. (A. 35)

STATEMENT OF FACTS

As indicated above, under "Statement of the Case", this appeal is taken from the District Court's denial of Maggio's motion to withdraw his plea of guilty.

The case had been remanded by the Fifth Circuit Court of Appeals (*United States* v. *Blake, et al.*, 488 F.2d 101), and had been set for trial on May 16, 1974. During the 10-day or week period prior to the trial date, counsel for Maggio and the prosecutor had numerous telephone con-

versations in the nature of plea bargaining. (A. 43, 44) During these conversations, at one point, the prosecutor agreed that he would recommend probation if Maggio were to plead guilty, if the Court would allow such a recommendation. (A. 47) Subsequently, the prosecutor informed Maggio's counsel that Judge Johnson would not allow any recommendation. (A. 47)

Maggio however, did tender a plea of guilty through his counsel on May 16, 1974. (A. 17) During this proceeding the trial Judge asked Maggio if he "concurr[ed] in that motion?" (A. 17) The Judge also informed Maggio of the possible statutory sentences and inquired of Maggio as to agreements and promises. (A. 18) However, the trial Judge at no time personally inquired of Maggio as to the nature of the charge or as to factual guilt. (A. 17-19)

Between the acceptance of the plea and the sentencing approximately six hours later that same day, Maggio had a conversation with the prosecutor in which the prosecutor told Maggio "he would be all right." (A. 49) Further the prosecutor had informed Maggio between the time of the plea and the sentencing that a telegram had been received from the United States Attorney's office in Chicago stating that Maggio had provided information leading to indictments and convictions and recommended probation for Maggio. (A. 118-120) The prosecutor stated that he had told Maggio that this telegram had been given to the Judge. However, the trial Judge at the time of hearing on the motion to withdraw the plea stated that he had asked the F.B.I. to verify the telegram and that the Judge had been informed by an agent that the telegram was partially false. (A. 119) This fact was not told to Maggio prior to his sentencing and thus he had no chance to rebut the erroneous statement of the F.B.I. agent.

Maggio had these above representations in mind and was very confident about his sentence when the trial Judge asked him prior to sentencing if there was any reason why he should not then be sentenced. (A. 67)

Maggio testified that he believed that he would receive leniency in sentencing and that in fact he was not guilty of the charges in the indictment but that he plead guilty only to save trouble all around. (A. 56)

Maggio had been sentenced to imprisonment for a period of two years (A. 16) Thereafter he filed his motion to vacate the sentence and to withdraw the plea. (A. 21) After hearing, the motion was denied. (A. 28)

REASONS FOR GRANTING THE WRIT

In this case the Fifth Circuit Court of Appeals has held that "substantial compliance" with Rule 11 of the Federal Rules of Criminal Procedure is sufficient to uphold a plea of guilty. This holding appears to be in direct conflict with this Court's prior holding in *McCarthy* v. *United States*, 394 U.S. 459, 22 LEd 2d 418 wherein this Court held there is inherent prejudice in a failure to scrupulously comply with Rule 11.

In addition, the Fifth Circuit had prior to the taking of the plea in this case required all district courts within the Fifth Circuit to take certain specified procedures on taking a plea of guilty (in effect, an early implementation of the proposed amended Rule 11). Both the district court and the Fifth Circuit found that the Fifth Circuit's requirements were deliberately not fulfilled. This Court should determine whether such a deliberate noncompliance is a denial of due process and of equal protection of the laws to the petitioner.

Lastly, both the district court and the Fifth Circuit Court of Appeals found that the petitioner "truly believed" that he would receive a substantially lesser sentence upon his plea. This court should determine and precisely define "understanding . . . the consequences of the plea".

ARGUMENT

I.

STRICT COMPLIANCE WITH RULE 11 IS REQUIRED.

In this case there is no question that the trial judge did not personally address the defendant and determine that the plea was being made voluntarily "with understanding of the nature of the charge and the consequences of the plea". (A. 17-19) The Court of Appeals acknowledges the fact that the trial judge did not personally address the defendant to make these determinations but in fact relied on the trial judge's "personal knowledge of the previous trial, Maggio's presence at that trial, and the jury's conclusion that Maggio was guilty . . .". (App., p. 12)

The Court of Appeals on this basis found that "Rule 11 was substantially complied with in this case" (App., p. 11).

Yet this Court in *McCarthy* v. *United States*, 394 U.S. 459, 471-472, 22 LEd 2d 418, 428, stated:

> "We thus conclude that prejudice inheres in a failure to comply with Rule 11, for noncompliance deprives the defendant of the Rule's procedural safeguards, which are designed to facilitate a more accurate determination of the voluntariness of his plea. Our holding [is] that a defendant whose plea has been accepted in violation of Rule 11 should be afforded the opportunity to plead anew. . . ."

Furthermore, at 394 U.S. 471, 22 LEd 2d 428 this Court states in discussing the possibility that the defendant in *McCarthy* did not fully understand the charge against him:

> ". . . had the District Court *scrupulously* complied with Rule 11, there would be no need for such speculation. At the time the plea was entered, petitioner's *own* replies to the court's inquiries might well have attested to his understanding of the essential elements of the crime charged. . . ." [Emphasis added]

The Court also stated at 394 U.S. 467, 22 LEd 2d 426:

> "To the extent that the district judge thus exposes the defendant's state of mind on the record through personal interrogation, he not only facilitates his own determination of a guilty plea's voluntariness, but he also facilitates that determination in any subsequent post-conviction proceeding based upon a claim that the plea was involuntary. Both of these goals are undermined in proportion to the degree the district judge resorts to 'assumptions' not based upon recorded responses to his inquiries. For this reason, we reject the Government's contention that Rule 11 can be complied with although the district judge does not personally inquire whether the defendant understood the nature of the charge".

Also as this Court stated at 394 U.S. 470, 22 LEd 2d 427:

> "There is no adequate substitute for demonstrating in the record at the time the plea is entered the defendant's understanding of the nature of the charge against him".

The Second Circuit has agreed with this Court's holding in *McCarthy*, e.g., *Irizarry* v. *United States*, 508 F.2d 960.

Yet, now in this case the Fifth Circuit holds that merely "substantial compliance" is necessary and that there is

substantial compliance where the district judge relies on matters outside the record at the time of the plea and thus where the district judge "assumes" compliance. This is directly contrary to this Court's opinion in *McCarthy*.

II.

FAILURE OF THE DISTRICT COURT TO COMPLY WITH THE MANDATE OF THE FIFTH CIRCUIT COURT OF APPEALS DENIED THE PETITIONER DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS.

Approximately 42 days prior to the entry of the plea in this case, the *en banc* Fifth Circuit Court of Appeals issued its opinion in the case of *Bryan* v. *United States*, 492 F. 2d 775, (Opinion dated April 4, 1974—plea entered May 16, 1974), and therein stated:

> "Thirty days after the date of this opinion all district courts in this circuit shall put into effect the following supplementary practices at the time of taking pleas of guilty or nolo contendere. The court shall state that plea agreements are permissible and that the defendant and all counsel have a duty to disclose the existence and details of any agreement which relates to the plea tendered. Specific inquiry shall be made as to the existence of such an agreement before a plea is accepted. The defendant shall be placed under oath. These are minimum practices and are not intended to circumscribe any additional procedures or inquiries deemed by any court to be pertinent to the issue of plea propriety in any case."
>
> (492 F. 2d 775 at 781)

It is contended by the petitioner that these procedures were in effect an early implementation of parts of the revised Rule 11 promulgated by this Court and which has finally been enacted as modified (See 17 CrL 3215) by ap-

proval of the Congress and signature of the President on August 6, 1975.

The record is clear that the petitioner and his counsel were unaware of the *Bryan* decision at the time of the plea because it had not yet been published (A. 24, 112). Yet, clearly, the district judge and the prosecutor were aware of the mandated procedures and yet the district judge deliberately violated the mandate because of his expressed belief that it did not apply to him (A. 31, 94).

The district court thus denied this petitioner equal protection of the laws and the due process of law guaranteed him by the Fifth Amendment to the Constitution.

Obviously, the petitioner's plea taken before the district court in Montgomery, Alabama, was being taken in a different manner than those taken throughout the rest of the Fifth Circuit and this was being done solely on the judgment of the district judge.

This Court has heretofore held that the rights of equal protection and due process are protected by the Fifth Amendment. (e.g. *Bolling* v. *Sharpe,* 347 U.S. 497, 98 L. Ed. 884, and cases cited therein.)

To deny this petitioner the mandated procedures required throughout the Fifth Circuit is to discriminate against him and to deny him his Constitutionally protected rights to equal protection and due process.

III.

WHERE A DEFENDANT "TRULY BELIEVES" THAT HE WILL RECEIVE A LESSER SENTENCE, HE DOES NOT UNDERSTAND THE CONSEQUENCES OF HIS PLEA.

The district court and the Circuit Court of Appeals found that the petitioner ". . . truly believed that he would

get no more than four months incarceration and that he probably would get only probation with no jail sentence'' (App. p. 13) In other words, the petitioner, although told of the possible maximum sentence, did not understand that he could get two years imprisonment as he did.

If the petitioner's belief had been solely his own belief not based upon fact or reason, the petitioner might agree with the Court of Appeals' finding that the subjective belief of a defendant as to the amount of sentence unsupported by any promises from the government or indications from the court is insufficient to invalidate a guilty plea as unknowing.

However, in this case the petitioner had been aware of the negotiations between his counsel and the prosecutor. Further, on the day of the plea, apparently contrary to the district judge's own position that he would not receive recommendations, he did receive from the prosecutor a telegram from the Chicago United States Attorney's Office requesting probation for the petitioner. Further, following the delivery of the telegram to the judge, the prosecutor indicated to the petitioner that ". . . he would be all right.'' When Maggio replied in the negative to the trial judge's inquiry as to agreements at the time of the plea, it must be understood that the agreements were understood by Maggio to be confidential, although Maggio understood that the agreements had been transmitted to the trial judge. The trial judge did not make this part of the record at the time of the plea.

Clearly, petitioner's belief that he would receive probation or only a few months incarceration was not unreasonable.

It is argued to this Court that a defendant who truly believes he will receive a lesser sentence does not understand the consequences of his plea.

A reading of the amended Rule 11 shows that these problems should be obviated if the district courts scrupulously follow the new Rule. The trial court will now have to be informed of the negotiated sentence and indicate its acceptance or rejection. If the trial court rejects the negotiated sentence, the defendant will be allowed to withdraw his plea. This is only fair.

Likewise, the petitioner should be allowed to withdraw his plea.

CONCLUSION

For the foregoing reasons, the petitioner respectfully submits that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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